APPENDIX

45 U. S. C. A. 51.

"Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 1, 1939, c. 685, Sec. 1, 53 Stat. 1404."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

HARRY M. AVANCE,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation,
Respondent.

No. 324.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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IN THE

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ANSWER TO PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT THEREOF.

May It Please the Court:

Answering the petition of Harry M. Avance, the respondent Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, respectfully shows to this Honorable Court:

THE JUDGMENT OF WHICH REVIEW IS SOUGHT.

In its opinion, the Supreme Court of Illinois concludes that the judgments of the Appellate Court and Circuit Court of St. Clair County should "be reversed and said cause remanded to the Circuit Court for a new trial" (R. 87). The formal judgment of the Supreme Court of Illinois is that "the judgments of the Appellate Court, Fourth District, and of the Circuit Court of St. Clair

County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of St. Clair County for such other and further proceedings as to law and justice shall appertain in accordance with the views expressed in the opinion of the court, a copy of which it attached hereto" (R. 87).

The Supreme Court of Illinois, by its judgment, has not terminated the litigation between the parties on the merits of the case. On remandment, the Illinois practice permits the pleadings to be amended or restated. Depositions may be taken. The retrial directed is a trial de novo at which either party may introduce any competent evidence, and the jury may return any lawful verdict. The new trial proceeds just as if there had never been a prior trial.

Illustrative of the Illinois procedure on the reversal and remandment of a case for a new trial are:

Illinois State Trust Company v. St. Louis, Iron Mountain and Southern Railway Company, 217 Ill. 504, where the rule is stated:

> "The judgment entered in this court was, that the judgment entered in the country court on the former hearing should be reversed and that the cause should be remanded. The remanding order was without any specific directions—that is, was general. The effect of that judgment was to entirely abrogate the former judgment of the county court and to remand the cause to the county court for further proceedings precisely as if no trial had ever occurred, and on a rehearing to authorize either party to introduce testimony in the same manner as if the case had never before been tried, save that no proceedings should be had or taken inconsistent with the legal principles announced in the opinion rendered by this court." Op. 506-7.

Rigdon v. Moore, 242 Ill. 256, op. 257-8, wherein the court held that on a retrial of the case, the parties were relieved of a jury waiver and of stipulations of fact entered into on the original trial.

Petitioner's concern (Pet. p. 7) lest on retrial it be held there has been an adjudication of the commerce character of his employment is groundless. The cases he cites involve questions of law.

> "If specific directions are not given, it must be determined from the nature of the case what further proceedings are proper, and it is the duty of the court to which the cause is remanded to examine the opinion and proceed in conformity with it. (People v. Waite, 243 Ill. 156; Union Nat. Bank v. Hines, 187 id. 109.) In an action at law this court has no power to determine the facts on an issue of which the parties are entitled to a trial by a jury, and therefore, upon the remandment of an action at law for a new trial, the views expressed in the opinion in regard to the facts are not binding." Op. 217.
>
> P. C. C. and St. Louis Railway Company v. Gage, 286 Ill. 213, op. 217;
> See also C. B. & Q. Railroad Company v. Lee, Admx., 87 Ill. 454, op. 461.

In no sense does the judgment of the Supreme Court of Illinois finally determine the rights of the litigants on the merits of the case.

THE JURISDICTION OF THIS COURT.

Petitioner asks that the judgment in question be reviewed under Sec. 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

The statute makes it competent for the court by certiorari to require that there be certified to it for review

and determination "any cause wherein a final judgment * * * has been rendered or passed by the highest courts of a state."

The words "final judgment" have been in this and its comparable sections since the adoption of the Judiciary Act of 1789.

This court has from the beginning uniformly held that a judgment by the highest court of a state reversing the judgment of a subordinate court and remanding the case for a new trial is not final judgment within this Act of Congress.

The many cases on the point are collected in the brief supporting this answer.

Illustrative, however, of the principle is the case of Bostwick v. Brinkerhoff, 106 U. S. 3, wherein in the year 1882 it was stated:

> "The rule is well settled and of long standing that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.
>
> "It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error." Op. 9-10.

The cases relied on by petitioner do not depart from the first, the century old, the frequently and consistently fol-

lowed definition of finality. He takes excerpts from and makes facile exposition of those cases where most properly the court held it would look beyond the bare form of the judgment and see if, in substance, there was a judgment which within the definition, was final.

The situation here involved does not approach that considered in Clark v. Willard, 292 U. S. 112, where the Montana decree confirmed an execution, the enforcement of which would override the petitioner's title. The judgment as between petitioner and respondent was properly held to be final within the definition for which we contend, this court stating:

> "Further judicial proceedings may be necessary between the liquidator and others not before us. As between the liquidator and the respondents claiming as judgment creditors the suit is at an end. They came into court pro interesse suo with a petition to establish the priority of their judgment. The petition has been granted and priority decreed. Not only that, but an order vacating the execution has been reversed, and the levy reinstated. So far as these respondents are concerned, there is nothing more to be decided." Op. 118.

The doctrine of Haseltine v. Bank, 183 U. S. 130, was not abandoned. This court properly said that the opinion should be considered in interpreting the effect of the judgment in determining whether the judgment sought to be reviewed is final in that it terminates the litigation between the parties who come before this court on a petition for certiorari.

An examination of Department of Banking v. Pink, 317 U. S. 264, will disclose that the excerpt of dicta quoted (Pet. p. 8) was not used in the sense petitioner seeks to give to it. There certiorari was denied on the ground that the petition was untimely. Because of the frequent occurrence of the circumstances which required the denial, the

situation was, for the information of the bar, discussed. The language quoted by petitioner was used after the court had stated:

> "This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 USCA, § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 5 S. Ct. 799, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed." (Op. 267.)

We submit the dicta relied on by petitioner was not meant to change or even question the rule of finality.

The definition given by this court to the words "final judgment" has been adopted by the Congress; the statute, using the words having been repeatedly amended or re-enacted following their repeated definition by this court.

As permitting the review of State Court judgments by the Supreme Court of the United States, the word "final," as applied to such judgments, was first used in the 25th Section of the Judiciary Act of 1789.

As since interpreted and applied by the court, the words have meant a judgment by which specific relief has been awarded or denied and nothing remained (ministerial acts excepted) to be done other than to execute the judgment.

Since 1789 the statute has many times been modified and re-enacted, the same words "final judgment" being used. The last of these re-enactments was in 1925 (Feb. 13, 1925, c. 229, p. 1, 43 Stat. 937). Presumably and without any reasonable doubt the Congress knew of the judicial defini-

tion of the word "final" as applied to reviewable judgments of State Courts, as announced by the decisions of this Court over the course of more than a century.

This Court has repeatedly and consistently held that by the statutory reuse of words, which have previously been defined and applied by the court, the Congress intended to and did use and adopt the words in the sense they had been used and with the meaning which had been given them by the opinions of this court written prior to such re-enactments.

In Bruce v. Tobin, 245 U. S. 18, this court held a judgment of the Supreme Court of South Dakota was not final. This judgment set aside the action of the trial court rejecting a claim asserted under the Federal Employers' Liability Act, and, without fixing the amount of recovery, directed a new trial. Discussing the point it was said:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final, because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open, as it was settled under § 709, Rev. Stat., § 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. Ed. 138, 33 Sup. Ct. Rep. 78; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 419, 59 L. Ed. 1027, 1029, 1030, 35 Sup. Ct. Rep. 625. The re-enactment of the requirement of finality in the Act of 1916 was, in the nature of things, an adoption of the construction on the subject which had prevailed for so long a time." Op. 19.

In Latimer v. United States, 223 U. S. 501, the rule is stated as:

> "The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court." Op. 504.

See, also:

Hecht v. Malley, 265 U. S. 144, Op. 153.

The opinion and judgment of the Supreme Court of Illinois are consistent, fair and supported by the record.

Petitioner has serious misunderstandings concerning the record, otherwise he would not have charged that

> "The Supreme Court concealed vital and determinative facts not in dispute and misrepresented the contents of the record, particularly the sworn admissions of respondent, with reference to the only bona fide issue in the case" (Pet. p. 5);

or intimated that the Supreme Court of Illinois has "misrepresented the facts to defeat the operation of a federal statute" (Pet. p. 9); or stated that the

> "Unjudicial attitude of the court is manifested not only by the omissions and distortions of the record, but also by the determined effort of its author to place the evidence in the light most unfavorable to the petitioner" (Pet. p. 26); or

With reference to two comments in the court's opinion he would not have said "Both statements are false" (Pet. p. 27); and concluded:

> "We have heretofore established that the court below misrepresented the record. Under such circumstances our duty to our client impels us to challenge the bona fides of its decision" (Pet. p. 28).

With petitioner's conclusions, both as to the bona fides of the Supreme Court of Illinois, and the inferences, petitioner draws from the record, we completely disagree.

Because of these scurrilous and serious charges we have in the brief attached detailed the testimony concerning the disputed points as the record shows them and assert there is nothing to support the view that the Supreme Court of Illinois has not acted in good faith and without ample support in the record.

Petitioner forgets that although evidence may not be disputed, often several different and conflicting inferences may with equal fairness be drawn from it and what inference is to be drawn is a question for the jury.

Illustrative of this principle is the case of Plodzien v. Segool, 314 Ill. App. 40. There the court, considering a situation where different inferences could be drawn from the facts testified to, and said:

> "It is also the law that where, in such a situation, uncertainty arises as to the inferences that may legitimately be drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury" (Op. 42-43).

In Chicago & Northwestern R. R. v. Hansen, 166 Ill. 623, the rule was stated as:

> "Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to the jury; but if the court can say that but one reasonable inference can be drawn from the facts, the court should act accordingly" (Op. 629).

By "the facts" the court could only have meant the undisputed evidence.

In Offcut v. Columbian Exposition, 175 Ill. 472, the trial court had directed a verdict. In reviewing the judgment the court said:

> "The province of the jury must not be invaded, and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions the evidence must be submitted to the jury" (Op. 476).

In reviewing the so-called facts, petitioner assumes many which the record does not support and resolves all inferences in his favor.

His treatment of the "facts," the so-called "Sworn admissions," car PTX 4741, and the opinion of the Supreme Court of Illinois, are completely partisan and, we believe, not supported by the record. These we deal with in the brief in the support of this answer.

Petitioner forgets that he, having requested and secured a directed verdict on the contested commerce questions, that the testimony on the point must be considered in the light most favorable to respondent and all reasonable inferences are to be drawn in respondent's favor. Petitioner treats the case as if all doubts were to be resolved in his favor.

Typical of petitioner's straining of facts and attitude towards the court below is the first paragraph beginning on page 24 of his brief wherein he says:

> "Strange, indeed, is the assumption by the court that PTX 4741 'left St. Genevieve, Missouri, to Texarkana, Arkansas * * *' (R. 84). It is far more reasonable to assume that PTX 4741 came from Illinois, but whether it did or not, the movement to Arkansas is interstate all the way."

What the Supreme Court of Illinois (at R. 84) said was:

> "It was not on the switching list at the Bismarck yards when the train was made up, and left at 10:50

a. m., but more than an hour after the accident, it was in a train on which plaintiff worked, billed to Texarkana, Arkansas. If it was billed when it left Ste. Genevieve, Missouri, to Texarkana, Arkansas (fol. 118), it could be inferred it was in interstate commerce. If it came into the Bismarck yards unbilled and it was designated and started in interstate commerce after the plaintiff's injury, there could be a serious question whether the moving of this car was connected with interstate commerce. The billing or destination of the other cars in the switching movement coming from Ste. Genevieve does not appear, nor did they go out on the train after it was made up. When the train on which plaintiff regularly worked left Bismarck at 10:50 A. M. it contained twelve cars, and only PTX 4741 was interstate. The admission of defendant applies to the interstate movements of the train in question during the entire day of January 17, 1942, which does not necessarily admit such movements occurred at or prior to the time of plaintiff's accident" (R. 84).

Re: Thomson v. Industrial Commission, 380 Ill. 386. In its opinion the Supreme Court of Illinois does not once mention the case of Thomson v. Industrial Commission, 380 Ill. 386, certiorari denied 318 U. S. 755-6. Neither does the Supreme Court refer to or hold the 1939 amendment to the Federal Employers Liability Act to be unconstitutional.

The Supreme Court of Illinois holds only that under the Illinois practice the commerce character of petitioner's employment was a question for the jury and that the Circuit Court erred in giving the peremptory instruction requested by petitioner, which foreclosed the jury from considering the question.

In his statement of "Reasons Relied on for Allowance of Writ" (Pet. p. 11), petitioner seems principally to seek a review of the judgment (which this court has already refused to take) in the Thomson case.

In this case no question is involved or was considered pertaining to the constitutionality of the 1939 amendment.

But the petitioner having pleaded that at the time of his accidental injury he was "working as a freight brakeman, assisting in the switching of certain cars and participating in the furtherance of the movement of interstate commerce" (R. 2), and respondent having denied the averment (R. 6), it was in effect held that on the record and under the Illinois practice the question should have been submitted to the jury.

The burden of proving the averments rested on petitioner. Day v. C. & N. W. Ry., 354 Ill. 469.

Under the Illinois practice, where the record is silent as to the commerce character of railroad cars, the presumption is that they were of an intrastate character. Chicago, R. I. & P. R. R. Co. v. Industrial Board, 273 Ill. 528, Op. 532.

REASONS RELIED ON FOR DENIAL OF WRIT.

I. The judgment sought to be reviewed is not a "final judgment" within section 237 of the Judicial Code, Title 28, U. S. C. A., par. 344 (b), and this court has authority to review by certiorari only a "final judgment" of the Supreme Court of Illinois.

The effect of the judgment sought to be reviewed is to reverse and remand for a new trial (R. 88) a judgment of the Circuit Court of St. Clair County where a trial de novo will be had. Such a judgment is not "final" as the word is used in the statute, and as it has been interpreted and applied since the enactment of the Judiciary Act of 1789; as

It does not terminate the litigation between the parties on the merits of the case. Bostwick v. Brinkerhoff, 106 U. S. 3.

A judgment by a court of appeals, reversing and remanding the judgment of the trial court for further proceedings, is not final. Haseltine v. Continental National Bank, 183 U. S. 132.

The judgment of a state court is not final, so as to permit its review on certiorari from the Supreme Court of the United States, unless the judgment is such that on denial of certiorari nothing would remain to be done except to execute the state court judgment. Lodge v. Twell, 135 U. S. 232.

II. As permitting the review of state court judgments by the Supreme Court of the United States, the word "final," as applied to such judgments, was first used in the 25th section of the Judiciary Act of 1789.

As since interpreted and applied by the courts, the word has meant a judgment by which the plaintiff was awarded specific relief and nothing remained (ministerial acts excepted) to be done other than to execute the judgment; or where the defendant had been unequivocally denied such relief.

Since 1789 the statute has many times been modified and re-enacted, the same word "final" being used. The last of these re-enactments was in 1925 (Feb. 13, 1925, c. 229, P. 1, 43 Stat. 937). Presumably and without any reasonable doubt the Congress knew of the judicial definition of the word "final" as applied to reviewable judgments of state courts, as announced by the decision of this court over the course of more than a century.

This court has repeatedly and consistently held that by the statutory reuse of a word, which has previously been defined and applied by the court, the Congress intended to and did use and adopt the word in the sense it had been used and with the meaning which had been given it by the opinions of this court written prior to such re-enactments. Hecht v. Malley, 265 U. S. 144, op. 153.

III. Under the Illinois Practice Act, one of the material averments of petitioner's complaint was that "plaintiff and defendant, and each and both of them were, at the happening of the occurrence herein pleaded, engaged in interstate commerce and in furthering and actively participating in furtherance of the movement of interstate transportation" (R. 2). The burden was on the plaintiff to prove such averment. Day v. C. & N. W. Ry., 354 Ill. 469.

Where the record is silent as to the commerce character of railroad cars, in Illinois courts the presumption is that they were of intrastate character.

C. R. I. & P. R. R. v. Industrial Board, 273 Ill. 528, Op. 532.

Wherefore, the respondent respectfully suggests that the writ of certiorari prayed for by petitioner in this cause should be denied and that the petition should be dismissed.

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